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Resolving Nazi-era looted art disputes by ADR processes

Arthur Tompkins NEW ZEALAND DISTRICT COURT and SUPREME COURT OF PITCAIRN ISLAND and Louisa Gommans RAINEY COLLINS LAWYERS

Introduction

At midnight on 5 July 2006 in central New York, an anxious Ronald Lauder paces the sidewalk outside his Neue Galerie, opposite Central Park. He is awaiting the arrival of *The Woman in Gold*. Having paid US\$135 million for Gustav Klimt's luminous portrait of Adele Bloch Bauer, he wants to ensure she arrives safely in her new home. It is the culmination of the portrait's eight-decade long journey from Vienna to the United States.

In the ancient city of Benevento, north east of Naples and renowned since early classical times, an octogenarian cathedral librarian gently takes an early 12th century codex from a box, in which it has travelled from England. He and others celebrate the return of the codex, 65 years after its disappearance amid the rubble of a heavily bombed Naples.

Both these stories illustrate the use of ADR processes to resolve the complexities of Nazi-era looted art disputes, triggered by the enjoinder in the Washington Conference Principles on Nazi-Confiscated Art (Washington Principles) that a "just and fair" solution should actively be sought to resolve such disputes.

In this short article we examine (after a very brief description of the greatest art theft in history) two commonly encountered and often insurmountable hurdles facing claimants. We then discuss the Washington Principles, and the role ADR processes can play in finding just and fair solutions to these difficult disputes.

The Nazi campaign of art theft

Between 1933 and 1945, the Nazis conducted history's largest, best-organised and most extensive campaign of art theft. Hitler's megalomaniacal fantasy of building the world's greatest museum in his adopted hometown of Linz (especially after his 1938 visit to Florence, when he realised that a drab Berlin could never compete with the beauty of the heart of the Italian renaissance), and the Nazis' twisted ideology, drove him, Hermann Göring, Alfred Rosenberg (later to hang after Nuremberg), and very many other Nazis, to strip

conquered nations in both Western and Eastern Europe of vast quantities of their art.

Unravelling the chaos that followed continues today, well over half a century later. Disputes flow from the stolen art works' tortured provenances, in circumstances where much if not all evidence has gone, witnesses have been killed or died, memories have faded or have been lost, and history is murky. These combine to present unique challenges that domestic courts, applying constrained legal rules and hedged about with evidential restrictions, are oft-times ill-equipped to meet.

Obstacles to a legal claim

While a small number of countries (including the Netherlands, Germany, France, Britain and Austria) have independent commissions handling claims relating to Nazi era looted artworks, each has varying practices and limited scope to compel resolution. There is no consistency of approach between countries, and no international tribunal able to resolve disputes crossing borders and decades, or indeed to enforce restitution.

Several "blockbuster" cases in recent years, along with the increasing value attributed to contentious artworks and their artists, have substantially raised the stakes. Some auction houses will research the provenance of looted artworks that come through their doors and try to encourage a fair settlement. But more often than not parties are left to the vagaries of the local law, which frequently favours the current owner and leaves claimants relying on the goodwill of the party holding the looted art.

Litigation should be a last resort

If an original owner, or their heirs, discovers that a looted artwork has resurfaced, and if the current owner is not forthcoming about its return, their last – not first – resort should be to seek an order compelling return from an appropriate court (generally, but not always, the jurisdiction where the work, as a moveable, is situated).

As the years and decades pass after the original looting of the artwork, factual and evidential problems will inevitably have arisen. They will continue to arise, reducing the chances, if there ever was chance, of a successful outcome. And in addition to those case-specific problems (plus, of course, the financial and emotional cost of taking the claim), the claimant will often face two considerable legal hurdles — the limitation period and the bona fide purchaser rule.

Limitation periods

The underlying purpose of a limitation period — usually but not always 2, 3, 6 or 10 years — is to achieve certainty and finality. The applicable limitation period will be arbitrarily set by the relevant local law. The pivotal question in an individual case may well be to decide the moment at which the limitation clock begins to tick.

Many jurisdictions apply the “demand and refusal” rule — that is, the limitation period does not begin until the dispossessed owner, having located the stolen art work, makes a demand for its return and is refused by the person or entity in possession. This tends to favour the claimant.

Another approach to triggering the limitation timer, and one which tends to favour the current possessor, is the discovery rule, under which the limitation period starts when either the dispossessed owner discovers where the stolen artwork is or, exercising reasonable diligence, should have discovered its location.

Whichever approach is taken, a finite limitation period frequently closes out a meritorious claim literally before it has even begun — a result which paucities of information, motivation, resources and expertise often conspire to produce, irrespective of the justice of the claim and despite there being no disputing the original theft.

The bona fide purchaser

The second obstacle to the claim of the dispossessed owner arises because of the differing approaches taken across jurisdictions to the problem of “the bona fide purchase for value without notice”.

It is a fundamental principle in common law countries that a thief can give no greater title to goods than the thief has, irrespective of the circumstances of the final possessor. This is reflected by the *nemo dat* rule: you cannot give what you do not have. Again, this rule tends to favour the claimant.

By contrast, in civil law countries, predominantly but not exclusively those who derive their legal systems from the Napoleonic Civil Code 1804, the bona fide purchaser who proves a good faith purchase can secure

a good title, after the expiration of differing periods of time. This approach often tips the balance in favour of the current possessor, as illustrated recently during the protracted litigation surrounding Pissarro’s *Rue Saint-Honore in the Afternoon, Effect of Rain*.

Camille Pissarro painted *Rue Saint-Honore in the Afternoon, Effect of Rain* in 1897. Forty years later, in 1939, Lilly Cassirer Neubauer, a member of a prominent Jewish publishing family that had owned the painting from the beginning, was faced with a stark choice: hand the painting over to a Nazi art dealer and be given, in return, an exit visa to leave Germany with her husband and young grandchild, or remain in Germany amid the swirling and deadly storm engulfing Germany’s Jews.

Unsurprisingly, she chose the former. Lilly and her husband Otto and grandson Claude fled Germany. The painting disappeared. The ridiculously low sum that Lilly had been promised as the “price” of the painting was locked in an inaccessible German bank account.

After the war, Lilly sought and was granted partial financial compensation but without foregoing her claim to the painting. But the Pissarro was lost. Or so she thought. In fact, and after a complicated and tortuous journey, it ended up in the Museo Thyssen-Bornemisza in Madrid. Lilly’s heirs have, since 2010, been trying to recover the painting through litigation in both Spain and California.

On 4 June 2015 a California Court ruled¹ that Spanish law, and not Californian law, was the governing law of the merits of the dispute. That being so, the judge was compelled to rule that under Spanish law the museum is the owner of the painting, despite the acknowledged theft from Lilly decades earlier.

The role of alternative dispute resolution

The fundamental freedom of choice which is essential to alternative dispute resolution makes it ideally suited to resolving disputes relating to Nazi-era looted art. This is especially so because there is so often little or no legal framework able to compel the return of the art. In many cases, it may be the strength of the rightful owner’s moral claim that ultimately persuades the current possessor towards restitution.

Witness the return, to the heirs of Paul Rosenberg, the Jewish dealer and original owner, of Matisse’s 1937 *Woman in Blue in Front of a Fireplace*. Originally stolen from Rosenberg (along with much else) by the Nazis, it ended up, after a bona fide purchase in 1950, as one of the centrepiece works in Henie Onstad Art Center (the Art Center) in Norway. Under Norwegian law the Art Center had the legal right to keep it. And indeed this was the first response of the Art Center when the claim was



Camille Pissarro, *Rue Saint-Honoré in the Afternoon. Effect of Rain*, 1897, Oil on canvas. 81 x 65 cm
Museo Thyssen-Bornemisza, Madrid

notified. However, Norway is a signatory to the Washington Principles (see below), including Principle 8:adr

If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

This, along with the strength of the heirs' moral claim, was instrumental in persuading the Art Center to return the work.²

With flexibility of process, approach, method and result, the parties can craft a creative solution that benefits them both. This might for example involve return of the artwork from a museum to its lawful owner, while retaining some rights for the museum to display the work from time to time.

The Washington Principles

Over 4 days, from 30 November to 3 December 1998, a major conference was held in Washington DC known as the Washington Conference on Holocaust-Era Assets. Released to coincide with that conference was a statement of 11 agreed principles.³ The Preamble records:

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

Principle 11 states: "Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues."

These non-binding international declarations encourage the resolution of claims not on the basis of legal technicalities but rather "on the facts and the merits".

The Washington Principles have had a slow-burning but fundamental effect on the use of ADR to resolve Nazi-era looted art disputes. The two case studies mentioned at the beginning of this article vividly illustrate that.

Adele Bloch-Bauer

In the Neue Galerie on New York's 5th Avenue, the Provenance Statement accompanying Gustav Klimt's luminous *Portrait of Adele Bloch-Bauer (Adele)* reads:⁴

Provenance

Adele and Ferdinand Bloch-Bauer, Vienna (Acquired from the artist).

Seized by the Viennese Magistrate (following the Nazi Anschluss, March 1938)

With Dr. Erich Führer, Vienna (the state-appointed administrator for Ferdinand Bloch-Bauer)

Österreichische Galerie Belvedere, Vienna.

Restituted to the heirs of Adele and Ferdinand Bloch-Bauer by the Republic of Austria
Neue Galerie New York

Those few lines conceal a very long and storied history of tragedy. The portrait's 80 year journey from 1920s Vienna to present-day New York is complicated, but for present purposes is notable for two things: First, a change in Austrian federal law in 1998, prompted by Austria's commitment to the Washington Principles, that "require[d] all federal museums to ensure their holdings were free of art illegally seized during the war".⁵ And then the bold and, in the end, successful decision by Maria Altmann and the other heirs of Ferdinand Bloch-Bauer, to abandon long-running litigation in the United States in favour of arbitration in Austria.

And it was the decision to submit the dispute to binding arbitration in Austria that then compelled, as Anne-Marie O'Connor puts it in *The Lady in Gold*,⁶ the three Austrian arbitrators "[to begin] a long walk through history. This was more than just law. This was a search for justice."

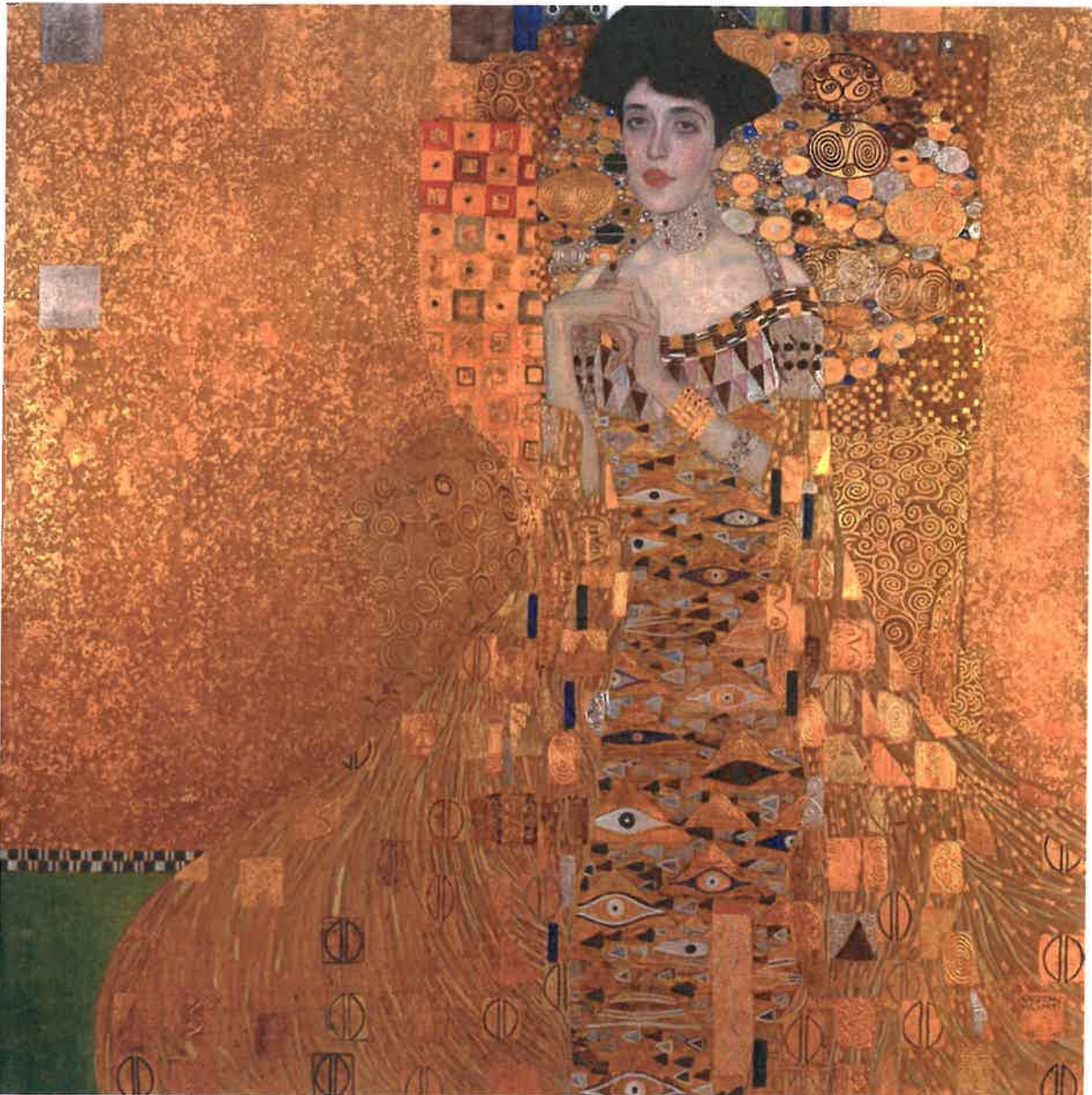
On 15 January 2006, the Austrian Arbitral Tribunal concluded that Adele's will, by which the paintings were left to Ferdinand but with a wish that after his death they be left to the Austrian nation, constituted a non-binding request so that Austria did not acquire title to the paintings via her will. The title was not otherwise acquired, and given that the requirements of the Austrian federal statute were required to be fulfilled, the tribunal directed that paintings should be returned to Ferdinand's heirs.

And soon after, in the pre-dawn winter darkness, *Adele* left the baroque Belvedere Palace in central Vienna to begin her journey to the United States. As O'Connor writes:⁷

Once again, the Lady in Gold was reborn. The portrait had been created, stolen, renamed [and] consigned to a shadowy underworld. It had miraculously eluded the inferno of war. A man who had seen Adele and never forgotten her paid \$135 million to buy her, legally, for the first time. Adele was now legend.

The Benevento Missal

The Benevento Missal was created in the early 12th century in the scriptorium of the Benedictine monastery at Benevento, an ancient cathedral city north east of Naples. By the late 17th century it was in the Chapter's Library in Benevento. On 14 September 1943 the Benevento Cathedral was destroyed by Allied bombing and the Chapter's Library was damaged. The Missal disappeared.



Gustav Klimt, *Portrait of Adele Bloch-Bauer I*, 1907,
Oil, silver, and gold on canvas. 138 x 138 cm
Neue Galerie, New York

In April 1944, amid the chaos of a heavily-bombed Naples, the missal was brought from a second-hand bookseller by an English army officer, Captain Douglas G Ash. Captain Ash posted the book from Italy to

England “wrapped in several yards of satinlike fabric”, thus (but probably unwittingly) exporting it illegally from Italy. In November 1946 the British Museum’s manuscripts department cautioned him that it might be

looted. Nevertheless it was purchased by the Museum at Sotheby's on 24 June 1947 for £420 and later transferred to the British Library. In 1976, a visiting Canadian scholar informed the Benevento Chapter Library that their missing missal was in the British Library. A request for its return was unsuccessful.

The United Kingdom's Spoliation Advisory Panel (the Panel) was established in 2000 as a direct manifestation of the Washington Principles.⁸ It can consider claims for the return of objects held in the British national collections that were plundered or lost during the Nazi era.

Crucially, the Panel's process is explicitly an alternative to litigation. It must give due weight to the "moral strength" of the claim and consider whether any moral obligation rests on the holding institution. It is required to seek a "fair and just solution".⁹ The Holocaust (Return of Cultural Objects) Act 2009 (UK) permits the return of an object where:

- the Panel has recommended that; and
- the Secretary of State has approved the recommendation.

The claim for the return of the Missal was heard by the Panel twice. At the first hearing it concluded that return of the Missal would be fair and just.¹⁰ The Panel concluded in its second report of September 2010:¹¹

8. *The Panel recommends*, in conformity with its original conclusion [that the return of the Missal would be fair and just], that the Missal should be returned to the claimants. If the Secretary of State approves this recommendation, the British Library will be free pursuant to Section 2(2) of the Act to transfer the Missal to the Chapter Library in Benevento.

In 2010 the Missal was in fact returned, (carried to Italy as hand-luggage by the lawyer who had, *pro bono publico*, represented the claimants) amid much celebration.

Conclusion

Resort to litigation should always be a last resort, in any kind of case. That is emphatically so when what is claimed is an artwork stolen decades earlier, and in circumstances where invariably the chaos of war and ill-fitting legal structures create numerous, repetitive, costly and often impassable barriers. ADR processes that enable a fair and just result, as recognised and encouraged by the Washington Principles, provide a far more compelling and often successful road to resolution.



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Judge Arthur Tompkins is a New Zealand District Court Judge and Judge of the Supreme Court of Pitcairn Island. Each year he travels to a small, ancient Umbrian hill-top town north of Rome, where he teaches Art Crime in War as part of the Postgraduate Certificate Program in International Art Crime Studies, presented annually by the Association for Research into Crimes against Art. He can be contacted at aimt@courts.govt.nz.



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Footnotes

1. *Cassirer v Thyssen-Bornemisza Collection Foundation* No 2:05-cv-03459-JFW-E (Cal 4 June 2015). This is unlikely to be the last battle in this particular war.
2. Amanda Borschel-Dan "Norway museum to return Matisse looted by Goering" *The Times of Israel* (online) 21 March 2014 www.timesofisrael.com/norway-museum-to-return-matisse-looted-by-goering/.
3. US Department of State, *Washington Conference Principles on Nazi-Confiscated Art*, www.state.gov/p/eur/rt/hlcst/122038.htm. The Washington Principles have been affirmed at the Council of Europe's Vilnius International Forum on Holocaust Era Looted Cultural Assets in 2000, and at the EU-sponsored Holocaust Era Assets Conference in Prague and Terezin, held in June, 2009.

4. Neue Galerie New York, *Gustav Klimt — Adele Bloch-Bauer I*, www.neuegalerie.org/collection/Austrian/Fine%20Arts?page=1.
5. S Houtp *Museum of the Missing: A History of Art Theft* Pan Macmillan, Australia 2006 p 67.
6. A-M O'Connor *The Lady in Gold: The Extraordinary Tale of Gustav Klimt's Masterpiece, The Portrait of Adele Bloch-Bauer* (1st edn) Knopf, 2012 p 251.
7. Above n 6, p 294
8. *Holocaust (Return of Cultural Objects) Bill: Committee Stage Report* Research Paper 09/59 (23 June 2009) s 2.2, p 3. Available for download at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP09-59>.
9. See the discussion in the *Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript now in the Possession of the British Library* (23 March 2005). Available for download at www.gov.uk/government/publications/report-of-the-spoliation-advisory-panel-beneventan-missal-in-the-british-library. Annexed to the Report are the Panel's Constitution, the texts of both the London Declaration of 1943 and the Washington Principles.
10. But return was at that time precluded by existing legislation: this was prior to the passing of the 2009 Act, which was recommended by the Panel in its first Benevento Missal decision and which removed this obstacle.
11. *Report of the Spoliation Advisory Panel in respect of a renewed claim by the Metropolitan Chapter of Benevento for the return of the Beneventan Missal now in the possession of the British Library* (15 September 2010) p 2.